M.U. and FEDERATION REPORTS.

ABRAHAM HO AH LOKE v. WILLIAM MANSON-HING.

[App. Civil Juris. (Pretheroe, Ag. C.J. Fed. of Malaya; Murray-Aynsley, C.J. S'pore; Laville, J.) June 16, 1948]

[K.L. — Civil Appeal No. 12 of 1947; Selangor Civil Suit 13, 1946]

Duties of Appeal Court — Credibility of witnesses — Demeanour of witnesses — Remuneration of architects.

In this case the respondent claimed the sum of $62,552.40 for work done and drawings, specifications and documents prepared by him on the instructions, and at the request, of the appellant. During the course of the trial, and as a result of evidence given by an expert witness, the respondent's claim was reduced to $8,831.10. At the conclusion of the evidence counsel for the respondent agreed that the figure should be further reduced by the sum of $333.60. In this way the respondent was awarded the sum of $8,497.50 The appellant appealed.

Held, (1) that though an appellate tribunal will generally defer to the opinion of a trial Judge on the demeanour of a witness whom he has seen, nevertheless, it is the duty of the appellate tribunal to check by critical examination of the whole of the evidence the trial Judge's conclusion as to the truthfulness of that witness; (2) that the credibility of a witness's story should be based on its inherent consistency with the facts and circumstances alleged therein. Weight is added to this initial probability by other factors; corroboration by other witnesses will strengthen it; credible extrinsic circumstantial evidence will do the same; and lastly the demeanour and tone in which the witness gives evidence will add to fortify (if favourable) the inherent probability of the story but the last named is the least weighty element in the credibility of a story; (3) that in the absence of an express contract, an architect is not entitled to claim for work done by him, if the plans prepared are not approved or made use of by the person who asked him to prepare the plans.

Cases referred to :—

(1) *Powell v. Streatham Manor Nursing Home* (1935) A.C. 243.

(2) *Yuill v. Yuill* (1945) 1 A.E.R. p. 183.

CIVIL APPEAL.

Dato Roland Braddell (*Joaquim* with him) for the Appellant.

Marjoribanks for the Respondent.

Pretheroe, Ag. C. J. : — In this suit the plaintiff claimed the sum of $62,552.40 for work done and drawings, specifications and documents prepared by him on the instructions, and at the request, of the defendant. The documents related to proposed cinematograph theatres at the Great Eastern Park and Pudu Road, Kuala Lumpur, and at Klang and Raub, and also to certain alterations made to the Coliseum theatre in Kuala Lumpur. During the course of the hearing it was proved that plaintiff had been paid in respect of the alterations made to the Coliseum theatre and had given a receipt dated the 4th April, 1946. This item of the claim was therefore abandoned. During the course of the trial, and as the result of evidence given by an expert witness, plaintiff's claim was reduced to $8,831.10. At the conclusion of the evidence counsel for the plaintiff agreed that this figure should be further reduced by the sum of $333.60 which had been claimed in respect of the work done in connection with the projected theatre at Raub. In a considered judgment the learned trial Judge awarded the plaintiff the sum of $8,497.50 which is the difference between the amounts last quoted above.

In his judgment the learned trial Judge said :—

> The plaintiff was also in the witness box for nearly five days so I had equal opportunity to observe him..... He impressed me as an honest witness.

The learned trial Judge then proceeded to find as a fact that there was a contract between the plaintiff and the defendant in respect of proposed theatres at the Great Eastern Park, Pudu Road and Klang, and that the terms of that contract were as stated by the plaintiff in his evidence. Now when a Judge has come to a conclusion upon the question which of the witnesses, whom he has seen and heard, are trustworthy and which are not, he is normally in a better position to judge of this matter than an appellate tribunal, and the latter tribunal will generally defer to the conclusion of the trial Judge — *Powell v. Streatham Manor Nursing Home*[1]. *Yuill v. Yuill*[2] is authority, however, for the proposition that it is the duty of an Appeal Court to check by critical examination of the whole of the evidence a trial Judge's conclusion as to the truthfulness of witnesses. In this particular appeal there is a large volume of documentary evidence which can be used to check the oral evidence. One of the exhibits, P6, is the so-called professional diary of the plaintiff. It is written, entirely in the handwriting of the plaintiff. and at the hearing he constantly made reference to it to refresh his memory. In his evidence plaintiff stated that the contract was concluded on the 22nd September 1945 at a meeting in the defendant's office in the Odeon Theatre (page 15), and that the terms of the contract were that he should be paid 7½% of the estimated cost if the theatres were erected (page 19). At page 16, however, plaintiff stated that defendant had promised him, at the meeting held on the 22nd September 1945, 7½% for architectural work and 2½% for structural engineer's work. Now

turning to the diary, the only reference I can find to this contract appears on page 4, and it is first entry in the diary. It reads as follows :—

> "Sept: 22, 1945. Ho Ah Loke commissioned me to design cinema..... Fee 7% of $130,000 = $9,100".

It will be observed that the singular number is used, and on page 12 of the diary, which relates to the proposed Pudu Road theatre, there is no entry prior to 24th November, 1945, and on page 13, which relates to the proposed Klang theatre, there is no entry prior to 21st April, 1946. It will be seen that in his oral evidence plaintiff said his fee was to be 7½% of the estimated cost, but the diary refers to 7% only. If, as claimed, the entries were made contemporaneously in the diary, plaintiff had arrived at the estimated cost of the Great Eastern Park theatre the very same day the contract was concluded. It is also noteworthy that in his plaint plaintiff gives the estimated cost of this theatre as $322,000. On page 13 of the diary, which relates to the proposed Klang theatre, the following entry appears opposite the date 30th April, 1946 :—

> "He thinks he can out-manoeuvre me out of my 7½% and 4%".

The next entry on that page is dated the 13th May, 1946, and is as follows :—

> "Ho Ah Loke called at my residence. He agrees to pay me 10% for Klang cinema. I am to make out contract".

In the face of these entries, and in particular the various dates beside which they appear, it appears impossible to hold that the terms were agreed, and the contract in respect of all the theatres made, on 22nd September, 1945.

The plaint is in the form of a *quantum meruit* action and no specific contract is pleaded. At the hearing of the appeal Mr. Marjoribanks, for the respondent, frankly admitted that it was no part of his case that a specific contract was made on 22nd September, 1945. For these reasons I am of opinion that the learned trial Judge's finding of fact in this matter was in error. As plaintiff's evidence regarding that contract was definite and unqualified it is clear that my decision to disbelieve it seriously reduces the reliability to be attached to plaintiff's other evidence.

The next point to be considered is, if there was no formal contract what is the position of the parties? At the hearing of the appeal Mr. Marjoribanks put respondent's position very fairly and clearly when he said :—

> Our claim is that appellant commissioned respondent to prepare certain plans and specifications, he did so, and now he claims reasonable remuneration for the work he did.

It was not disputed that respondent prepared the sketch plans which were put in evidence at the trial, but appellant strenuously denied that they were produced on his instructions or to his order. He asserted that the respondent produced the sketch plans during the Japanese occupation "merely to while away the time". Again, the only two witnesses on the point are the parties themselves, and the question to be settled is which is telling the truth. When considering the reliability of plaintiff's evidence one cannot overlook certain facts connected with the production of a typewritten copy of certain portions of the diary. The facts were briefly that on the day before the trial the defendant's solicitor sent a clerk to type a copy of the diary. That clerk found the handwriting in the diary very difficult and, in places, impossible to read. This certainly can be accepted as a correct statement. So the solicitors for the plaintiff called the latter to their office to assist in deciphering the contents of his diary. Up to this point the evidence of both sides is in complete agreement. Then the clerk states that he handed the diary to respondent who read out the entries and he, the clerk, took them down direct on his typewriter and the typing was not checked at the time. The plaintiff, on the other hand, states that the clerk read from the diary but that he, the clerk, "occasionally asked me what certain words were". The learned trial Judge set out all the relevant facts of this incident and arrived at the conclusion that he accepted the plaintiff's version and disbelieved the evidence of the clerk. I find myself quite unable to accept this conclusion on the evidence of the two exhibits themselves. There are many differences, but I will refer to those which relate to the proposed Klang theatre only i.e. page 13 of the diary.

In the diary the first entry on this page is opposite the date 21st April, 1946. In the typed "copy" two entries appear before this date which do not appear in the diary at all. They are as follows :—

> "Oct: 9, 1945. Ho Ah Loke instructs me to design cinema for Klang — capacity 650 — 700 seats. He has not got the Klang Grant with him at the present. Land ample but rather low. Shown Ho Ah Loke completed plans. Hold matter in abeyance until later.
>
> March 29, 1946. Ho Ah Loke called in the morning. I am to scrap all previous designs for Pudu and Klang".

I pause here to remark that it appears extraordinary that a clerk, when hard pressed for time, should "copy" these entries which are non-existent. The first entry on that page of the diary (as far as I can decipher it) reads as follows :—

"April 21, 1946. Mr. Ho Ah Loke instructed me to re-design Klang cinema on March 29th. Capacity 600. 7½% architectural fee if built. 400 for plans if no work done!!!!!

\$3,000 monthly income from Rex cinema in bad times.
\$6,000 monthly income from Rex Cinema in good times.
\$9,000 monthly income from Rex Cinema in present times.
} 40% cut for film Coy.

\$90,000 investment in Ipoh cinema. Original dated Sep. 1945"

That entry appears in the typed copy as follows :—

"April 21, 1946. Design cinema capacity approx: 600 to 650. 7½% architectural fee 2½% structural engineer's fee. Ho Ah Loke makes ridiculous offer of \$400 for plans if no work done!!!!!

Rex cinema \$3,000 monthly income in bad times.
\$6,000 monthly income good times.
\$9,000 monthly income present excellent times.

He pays film company 40% of gross income.

He has invested \$90,000 in Ipoh cinema. Original design for Klang dated 23rd of Sept. 1945. Ho Ah Loke called in the morning. Gave him letter from Town Board asking for \$44 plan fee for Coleseum cinema. He will call for me at 1.30 p.m. to take me to examine site for cinema at junction of Batu Tiga Road and Bukit Kuda Road. I have charged Ho Ah Loke \$400 deposit for drawing plans for Klang cinema. Insisted on 7½% architectural fee. Fees subseqently increased additional 2½% to include structural engineer's fees total 10% estimated cost".

At this stage I ask myself if it is conceivable that this harassed clerk could have manufactured all these facts most of which are very favourable to plaintiff's case?

I will refer to one more entry, the next one on the same page, which reads as follows :—

"April 30, 1946. Ho Ah Loke called w. Lopez. He's v. anxious to get plans passed — he thinks he can out-manoeuvre me out of my 7½% + 4%!".

The typed copy follows the above until near the end when it reads :—

"outmanoeuvre me out of my 10% fee".

This is of some importance I think because, although the respondent's handwriting is extremely difficult to read, his figures are in large printed characters and are exceptionally clear. It is quite certain therefore that the clerk, if he was reading from the diary, would not have had to ask for any assistance in reading the clear figures. On the other hand it appears unlikely that he would arrive at the total of 10% if he added the figures together. Respondent's whole case was that he was entitled to a fee of 10% calculated on the estimated total cost of the buildings. The differences to which I have referred are so material that I have no hesitation in accepting the clerk's evidence and rejecting the respondent's evidence concerning the transaction.

This is the second occasion on which I have decided that I cannot accept the plaintiff's evidence as true, and there are several other instances where the evidence given by the defendant appears to be the more probable. Thus defendant maintained that the plaintiff had produced the sketch plans during the Japanese occupation to pass the time and that they were not intended for particular sites. This receives some support from the fact that no site plans were put in evidence.

Another matter which gravely reflects on respondent's credibility is the letter he wrote to the Town Board and, as a result of which, his name was entered in the local register of architects. That letter appears in exhibit D79 and contains the following statement :—

> I have been practising privately as Architect and Structural Engineer in Syonan-to until the outbreak of hostilities, having qualified to submit plans and specifications under the Fourth Schedule of the Architects Ordinance No. 12 of 1926.

The last part of this statement is completely untrue.

In my opinion therefore the evidence of respondent must be viewed with suspicion and examined critically. Now, the vital point to be decided in this appeal is, did appellant commission respondent to prepare any plans? On this point the respondent avers that he was so commissioned. The appellant strenuously denied any such commission and, in support of his denial, proved firstly that he had, and still has, no shares or interest in the Great Eastern Park, and secondly that at the time of the alleged contract appellant only had an undivided one half share in the Pudu Road site.

In such circumstances it appears to me to be highly unlikely that the appellant would commission anybody to prepare plans of theatres which would cost him thousands of dollars even though the theatres were never in fact erected. For these reasons I come to the conclusion that appellant did not commission the respondent to prepare the plans as alleged in the plaint.

I would allow this appeal and give judgment for the defendant and award him his costs in this Court and in the Court below. Costs on the higher scale and certified for two Counsel in this Court and in the Court below.

Murray-Aynsley, C. J. : — The respondent in the appeal, the plaintiff in the Court below, sued the present appellant for the sum of $62,552.40 "for work done and drawings, specifications and documents prepared by the plaintiff on the instructions of the defendant (appellant) and at his request". Certain parts of the claim were disallowed in the Court below; what remains relates to the proposed cinemas one at Klang, the others in Pudu Road and the Great Eastern Park both in Kuala Lumpur.

The appellant is an owner of cinemas; at the material times he owned the site of the proposed cinema in Klang. He owned an undivided half share of the Pudu Road site. He had no interest in the Great Eastern Park. There is a great conflict of evidence but it is clear that the respondent did prepare a number of plans between some time in 1945 and the end of May 1946 with the knowledge and assistance of the appellant. The question at issue between the parties is whether the appellant is liable to pay to the respondent any or what sum for the work done. A further question arises whether the respondent represented himself to be a qualified architect and whether in dealing with the respondent the appellant relied on the truth of this representation and whether this representation was in point of fact false.

In his statement of claim the respondent framed his claim as I have quoted above. Particulars were attached to the statement of claim which gave particulars of the various fees charged. They appear to be based on the scale of fees found attached to the Architects Ordinance of the Straits Settlements, which are the fees usually charged by architects in Selangor. That is, the claim is framed as though it were based on a *quantum meruit,* not on a specific contract to pay such fees. This is of importance when we consider the evidence of the respondent and the findings of the learned Judge who tried the case in the Court below.

When the plaintiff gave evidence in the Court below his evidence on this point is curious in view of the pleadings. There the respondent alleged that there was a specific contract made on September 22nd, 1945, by which the appellant agreed to pay certain specific fees based on a percentage of the estimated cost.

The learned Judge found as a fact that such a contract was made between the parties, and awarded not the sum claimed but the sum of $8,497.50. The reason for the difference is as follows. The respondent originally claimed for work done on five buildings. With regard to one of these, the Coliseum Cinema, in Kuala Lumpur, the claim was abandoned; with regard to another viz. a cinema in Raub, the trial Judge found in favour of the appellant. With regard to the three cinemas with which we are now concerned, the claim was reduced by various admissions made on behalf of the respondent to the figure which was eventually awarded.

On this part of the case the appellant seeks to persuade this Court to reverse this finding of fact. Counsel for the respondent did not attempt to support it. After examining the record I feel that counsel for the respondent could not have acted otherwise. The case for the respondent depended on himself assisted by what was described as a professional diary. It did not correspond with that description. It contained matters which one would not expect to find in such a document, certain entries were obviously not made contemporaneously; the whole seems to have been compiled with a view to possible litigation. Such a document cannot serve to corroborate the evidence of the party producing it. It may serve to destroy the value of that evidence; I think that in the present case it does so. Many of the entries are inconsistent with the existence of a contract such as that alleged. Further the respondent said that he prepared two contracts for signature by the appellant. These documents have been produced. Their terms do not correspond with the terms of the alleged contract.

If the express contract goes, can the respondent get anything on a *quantum meruit?* There is no doubt that none of the plans were approved or made use of by the appellant. Where there is no express contract it would seem that an architect is not in such a case entitled to claim anything. (See *Hudson, Building Contracts,* 6th ed. p. 48; *Brice,* p. 113). If there is a special contract, the respondent had to prove it. Can we, after rejecting the allegation of a contract of September 1945, find anything in the evidence of the respondent that would justify us in forming the conclusion that there was such a contract? In considering this matter we have to consider the credibility of the respondent. I think that we must at this stage consider who and what the respondent is. The respondent is an engineer and is qualified as such. It is equally certain that he is not an architect. Yet

it is clear from the evidence that at one stage of his evidence he was trying to persuade the Court that he was a qualified architect. At a later stage he was driven to contend that he was at least a registered architect, if not a qualified one. It is clear from the evidence that his only claim to be considered an architect is the fact that, contrary to law, he was registered as such by the Japanese in Kuala Lumpur. We have the further fact that the trial Judge awarded him less than $8,500 when he had claimed over $62,000. This seems to me a sufficiently damaging circumstance in the case of a claim by a professional man.

Though he negatived one of the claims, that relating to the Raub cinema, the learned Judge considered that the respondent was otherwise a reliable witness. With this estimate I am unable to agree. Apart from the considerations with which I have already dealt, an examination of his evidence leads me to the conclusion that the respondent was an unreliable, though no doubt a plausible, witness. The memorandum of appeal sets out certain instances of where he gave undoubtedly false evidence. I think that on the evidence these contentions are justified.

One side-issue was raised at the trial over the diary previously referred to. It is, I think, only of importance with regard to credibility. But as the learned trial Judge has formed certain conclusions on the matter, I will consider the matter at some length. The whole affair arose in this way. At a very late hour the solicitor for the appellant wanted extracts made from the diary and sent a clerk to the office of the respondent's solicitor for the purpose. As the diary was illegible the respondent was called upon to assist. There was a conflict of evidence as to the manner in which the respondent assisted but the result was certainly extraordinary. The version which the clerk produced differed very materially from the original and different in a certain way, namely, the entries in the clerk's version where they differed from the original, were longer and this expansion tended in each case to favour the respondent's case. This result could not be produced by copying however carelessly and it could not be expected to result from any other fault of the clerk whose job was to produce an accurate version and the interest of whose employers was to have an accurate version. The only way in which one would expect this result to happen would be if the respondent had dictated to the clerk and the clerk had taken down. But this is not what the respondent says. He says that the clerk copied from the original and he (the respondent) only explained passages which the clerk found it difficult to read. In this the respondent was supported by a clerk of his solicitors. The learned trial Judge attempted to test the veracity of the witnesses on this point. He did so by getting the clerk to read out passages in the same way as the respondent had done. When the clerk did so he omitted punctuation marks; the learned Judge came to the conclusion that the respondent's version was correct. I think that the test applied was fallacious, and in a case like this an examination of the two versions is more likely to lead to a true explanation than an impression formed by seeing the witnesses. I think this is sufficient to demonstrate that the learned Judge was imposed upon by the respondent.

That being so, I am of opinion that it is open to the Court to examine the probabilities of the case and see which version is the more likely.

The first thing to be borne in mind is, I think, the fact that, as a designer of cinemas, the respondent had his reputation entirely to make. Even to this day there does not, I think, exist a cinema which has been designed by him. The appellant, on the other hand, is well established in his business and in a position to command the services of architects of established reputation. It is contrary to all probabilities that the appellant should commit himself to large liabilities for drawings by an inexperienced person for cinemas which he had no definite intention of building and which have not yet been built; in one case the appellant had no interest in the site, in another the appellant only had an undivided half. On the other hand, it is extremely likely that the respondent would be prepared to submit plans to the appellant in the hope that some might meet with approval and be adopted. That is the appellant's version and I think that it is the probable one.

There remains the issue arising from the question of the respondent's qualifications or lack of them. I have already dealt with the facts. The learned trial Judge disposed of the question on the supposition that the question was one of importance in so far as a person was, by the bye-laws, entitled to submit plans or not so entitled. As long as the name of the respondent was *de facto* on the register he was entitled to submit plans, and therefore the respondent was an architect. I think it is doubtful what the legal effect of the respondent's registration by the Japanese is. But I think that this is altogether too narrow a way to regard the question. A person who

contemplates building does not go to a qualified architect because the bye-laws make it necessary or desirable in many cases. One goes to a qualified architect for the same reason as one goes to a qualified dentist, because the qualified person must necessarily have gone through a proper course of training and is more likely to produce a satisfactory result than another. In the present case the respondent was anxious to make not only the appellant but also the Court believe that he was qualified as an architect. An engineer and an architect, though they have points of contact, are not the same thing, and one should not go to an engineer for a cinema or to an architect for a railway bridge.

I think that the judgment appealed against should be set aside and judgment entered for the appellant with costs here and below.

Laville, J. : — I have had the advantage of reading the judgment of the President of this Court and find myself in entire agreement with him in regard to the view he has taken as to the facts of this case and in regard to the duties of the Court of Appeal in respect of a case in which a trial Judge bases his finding mainly on his estimate of the character and credibility of a witness as disclosed by his demeanour in Court at the hearing while giving evidence. I have little to add to the conclusions arrived at by the learned President.

In my view the credibility of a witness's story should be based on its inherent consistency with the facts and circumstances alleged therein. Is the story probable? is the test. Weight is added to this initial probability by other factors: corroboration by other witnesses will strengthen it; credible extrinsic circumstantial evidence will do the same; and lastly the demeanour and tone in which the witness gives evidence will add to fortify (if favourable) the inherent probability of the story. But the last named ingredient is in my opinion the least weighty element in the credibility of a story: the frank demeanour, the confident tone and the righteous indignation can all be simulated by a witness and are no substitute for the hard core of good evidence which lies in inherent probability and extrinsic corroboration.

It would appear in this case that the learned trial Judge has allowed this ingredient of demeanour to make good what is lacking of the other weightier ingredients which are noticeable by their absence in the evidence of plaintiff. If this view is correct, then in my opinion based on the judgment of the Court of Appeal in *Yuill v. Yuill*[2], it is open to this Court to find that the view the trial Judge has taken as to the demeanour of the witness is ill-founded and that on checking that impression by a critical examination of the evidence as a whole it is clear that the demeanour of the witness as assessed by the learned trial Judge was at variance with the inferences to be drawn as to his veracity and credibility from the evidence he has given. It is amply demonstrated by the instances cited in the judgment of the learned President and by other instances which examination of his evidence discloses that plaintiff's statements as to his qualifications and as to the terms of his remuneration were exaggerated at the commencement of his evidence and were so changed at the close of his evidence as to bear no resemblance to his original claims.

There was no express contract of employment of plaintiff by defendant as an architect to prepare plans and working drawings for cinemas at Great Eastern Kuala Lumpur, Klang, and Pudu, on a basis of a fixed remuneration.

The oral evidence of plaintiff on this point is vague both as to the estimated cost of erecting such cinemas and as to what percentage of those costs his fee was to be based on. It is quite clear from his so called professional diary, P.6, that there was no express contract on 22.9.45 for any cinema and that right up to 30th May, 1946, plaintiff was trying to induce defendant to come to written terms, and that the negotiations failed because the Town Board would not recognise plaintiff's plans if and when put in.

In any case the diary, P.6, is not independent corroboration of plaintiff's verbal claim as it was written by himself. In my view the terms mentioned therein were plaintiff's suggestions as to what he ought to get, and there is no evidence that defendant accepted them.

The gist of plaintiff's evidence and that of defendant is that defendant was willing to build at some unspecified future time and to employ plaintiff for so doing, provided they could come to terms as to plaintiff's fees in the event of defendant approving of any plans or specifications that plaintiff put up: it was open to plaintiff to put up as many and as detailed plans as he wished and if approved by defendant to get them approved by Town Board, when defendant would decide if he would build or not; then would come decision as to remuneration and its basis. As plaintiff could not get any plans passed by Town Board by 30th May, defendant employed other persons for the work.

If this is correct, defendant was under no obligation to remunerate plaintiff at all for any plans he might draw and put up for defendant's approval. The claim therefore should be dismissed.

The question arises how far should a trial Judge's views of reliability of evidence based on demeanour of witnesses prevail? Such a *volte face* cannot in my opinion conduce to belief in his veracity, nor can it lend any weight to an impression of honesty produced by a frank and open demeanour.

For these reasons I am of opinion that the appeal should be allowed and judgment entered for the defendant with costs in this Court and the Court below.

Appeal Allowed.

ABDUL KADIR AND ANOTHER v. T. KADERBHOY.

[App. Civil Juris. (Spenser-Wilkinson, J., Russell, J. and Briggs, J.) October 6, 1948]

[K.L. — Civil Appeal No. 22 of 1948]

Control of Rent Ordinance 1948. s. 2 — Definition of premises — Whether business premises where employees sleep for the night come within the Ordinance.

In this case the plaintiff-respondent was the tenant of a shophouse and he sublet the front half-portion of the ground floor of the said shophouse to the 1st defendant-appellant. The plaintiff brought an action claiming possession of the premises. The defendants-appellants contended the premises were premises within the definition of Section 2 of the Control of Rent Ordinance 1948 and that as the rent had never been in arrears for more than 14 days the plaintiff-respondent could not bring his action without first obtaining the permission of the Rent Assessment Board. The learned Chief Justice, who tried the case, held that "premises such as these, that is, the shop part of a shophouse designed for use as a shop, rented for use as a shop and used as such, cannot become premises used for human habitation merely because three or four employees of the second defendant firm sleep in the premises at night". He therefore held that the premises did not come within the definition of premises in the Control of Rent Ordinance and gave judgment for the plaintiff-respondent. The appellants appealed against this decision.

Held, (1) that as the evidence showed that the shop was used for human habitation by the employees, it came within the definition of "premises" in Section 2 of the Control of Rent Ordinance 1948; (2) that in any case the shophouse itself as a whole came within the definition of premises and if the tenancy was considered in relation to the whole building of which the premises let were a part it must come under that definition whether or not the shop part of the building was or was not used for human habitation.

Cases referred to :—

(1) *Phillips v. Hallabran* (1925) 1 K.B. 756.

(2) *Thomas v. Ward* L.R. 6 C.P. 327.

(3) *Cohen v. Benjamin* 39 I.L.R. 10.

(4) *Gidden v. Mills* (1925) 2 K.B. 713.

APPEAL FROM JUDGMENT OF WILLAN C.J. (given below).

Joaquim (*M. Edgar* with him) for the Appellants.

W. G. W. Hastings for the Respondent.

Willan, C. J. : — The plaintiff is the tenant of the whole of the premises situated at 43 Ampang Street, Kuala Lumpur, paying a monthly rental to the owner thereof of one hundred and sixty-two dollars and fifty cents. These premises consist of a shop house of the usual type in this country, with living quarters on the first floor. On the ground floor there is a shop consisting of one room 40 feet by 13 feet in the front portion facing Ampang Street; on the ground floor at the back, opening on to the back lane at the rear of this shop house, there is a space partly covered and partly uncovered containing a latrine and accommodation for bathing. A wall separates the shop and the back premises on the ground floor, and in this wall there is a window and a door. The shop can be closed in the usual way by wooden shutters as is customary in shop houses of this kind. These facts were proved in evidence.

I inspected the ground floor of this shop house in the presence of counsel for both parties. I found that the window, as well as being shut, had an almeirah hard against it at the back, and in the shop, at the front, this window had several strips of wood nailed across it. The door was shut and bolted. At the time of my inspection there were three show cases full of cloth piece-goods in the shop, two at each side and the third across the rear of the shop. Customers were being served in the shop at the time of my inspection.

The plaintiff, as tenant of the whole of this shop house, sublet the shop portion on the ground floor (hereinafter in this judgment referred to as "the premises") to the first defendant from the 1st day of June, 1946, for a period of twelve months at a monthly rental of two hundred dollars. The tenancy agreement for this sub-letting is in writing and stipulates that at the expiration of the twelve months the first defendant shall vacate the premises. The tenancy agreement is silent as to the use to which the premises sublet under it were to be put.

Twelve days after the execution of that agreement — i.e. on the 12th day of June, 1946 — the first defendant, by a written partnership agreement, entered